

EXHIBIT A

Confidential

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Case No. 1:15-cv-09936 (LGS)

RAMON MORENO, *et al.*,
Plaintiffs,

v.

DEUTSCHE BANK AMERICAS HOLDING
CORP, *et al.*,
Defendants.

CONFIDENTIAL REBUTTAL EXPERT REPORT OF WALTER TOROUS, PH.D.

November 6, 2017

18. **Exhibit 3** shows a distribution of Plan participants by the number of investment options each of them held. These data show that participants on average invested in between two and five investment options, with approximately 40 percent of participants holding this many investment options throughout the Class Period. An additional 30 percent of participants held only one option. The average number of investments held remained relatively stable throughout the Class Period.

IV. Overview of the Fundamental Principles of a Proper Damages Methodology

19. Principally, a proper damages analysis quantifies the economic losses incurred by Plaintiffs, if any, as the result of the alleged misconduct. In other words, damages should measure the difference between the stream of economic value Plaintiffs would have received had the alleged misconduct not occurred and the stream of economic value Plaintiffs have received or will receive given the alleged misconduct.²³ Therefore, without an accurate assessment of what the Plaintiffs' economic condition would have been but-for the alleged misconduct by Defendants, a damages analysis will not properly assess economic damages that can be *solely* attributed to the alleged misconduct.²⁴

²³ For instance, the Reference Manual on Scientific Evidence notes that “[t]he first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event. In most cases, the analysis considers the difference between the plaintiff’s economic position if the harmful event had not occurred and the plaintiff’s actual economic position. [...] Damages measurement then determines the plaintiff’s hypothetical value in the but-for scenario. Economic damages are the difference between that value and the actual value that the plaintiff achieved.” (Allen, M. A., et al., “Reference Guide on Estimation of Economic Damages,” *Reference Manual on Scientific Evidence*, 3rd Ed., 2011, Washington, D.C.: National Academies Press, p. 432.)

²⁴ According to the Reference Manual on Scientific Evidence, “[b]ecause the but-for scenario differs from what actually happened only with respect to the harmful act, damages measured in this way isolate the loss of value caused by the harmful act and exclude any change in the plaintiff’s value arising from other sources. Thus, a proper construction of the but-for scenario and measurement of the hypothetical but-for plaintiff’s value by definition includes in damages only the loss *caused* (emphasis in source) by the harmful act.” (Allen, M. A., et al., “Reference Guide on Estimation of Economic Damages,” *Reference Manual on Scientific Evidence*, 3rd Ed., 2011, Washington, D.C.: National Academies Press, p. 432.) In the Supreme Court decision in *Comcast Corp. v. Behrend*, the Court held that claims of economic harm must be caused by the conduct complained of in the case, citing p. 432 of this manual: “The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event.” (*Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 2013, p. 11.)

20. Additionally, a damages expert should apply reliable, tested, and supported theories—grounded by professional economic, financial, and industry principles—to the circumstances of the case, and should not merely perform mechanical calculations. That is, it is not sufficient to simply calculate the difference between actual and but-for scenarios without regard for whether those scenarios are properly constructed and reflect the facts of the case. A valid damages calculation must take into consideration relevant issues, data and facts, as well as widely accepted principles. Furthermore, a valid damages calculation must contain realistic assumptions of behavior.²⁵

V. Dr. Pomerantz Fails to Establish any Damages Attributable to the Presence of the Actively Managed Proprietary Funds as Core Investment Options in the Plan

A. Overview of Dr. Pomerantz’s performance-based damages methodologies

21. Plaintiffs allege that the inclusion of actively managed proprietary funds was imprudent because they “had significantly higher fees than comparable funds and a track record of poor performance.”²⁶

22. Dr. Pomerantz purports to assess damages attributable to the inclusion of the Actively Managed Proprietary Funds by applying two methodologies (collectively, “Pomerantz Models”).²⁷ Both of the Pomerantz Models calculate the difference in asset value that results from the net-of-fees returns of an alternative fund for each Actively Managed Proprietary Fund as compared to the

²⁵ Evans, E. A., et al., “Damages Theories and Causation Issues,” *Litigation Services Handbook*, 2017, John Wiley & Sons, pp. 28-34; Allen, M. A., et al., “Reference Guide on Estimation of Economic Damages,” *Reference Manual on Scientific Evidence*, 3rd Ed., 2011, Washington, D.C.: National Academies Press, pp. 431-432.

²⁶ Complaint, ¶ 5.

²⁷ Pomerantz Report, p. 4.

WALTER N. TOROUS

List of Testimony and Expert Submissions in the Last Four Years

- 2017 – *In Re Vale S.A. Securities Litigation*, In the United States District Court for the Southern District of New York, No. 1:11-cv-09539-GHW
Provided expert report.
- 2017 – *In Re RFC and ResCap Liquidating Trust Litigation*, In the United States District Court for the District of Minnesota, Court File No. 13-cv-3451 (SRN/JJK/HB); *Residential Funding Company, LLC and ResCap Liquidating Trust v. Provident Funding Associates, L.P.*, In the United States District Court for the District of Minnesota, Court File No. 13-cv-03485 (SRN/TNL)
Provided expert report.
- 2017 – *In Re RFC and ResCap Liquidating Trust Litigation*, In the United States District Court for the District of Minnesota, Court File No. 13-cv-3451 (SRN/JJK/HB); *Residential Funding Company, LLC v. Home Loan Center, Inc.*, In the United States District Court for the District of Minnesota, Court File No. 14-cv-01716 (SRN/HB); *Residential Funding Company, LLC v. Decision One Mortgage Company, LLC*, In the United States District Court for the District of Minnesota, Court File No. 14-cv-1737 (MJD/JSM); *In Re Residential Capital, LLC*, In the United States Bankruptcy Court for the Southern District of New York, Ch. 11 Case No. 12-12020 (MG); *In Re ResCap Liquidating Trust Mortgage Purchase Litigation*, In the United States Bankruptcy Court for the Southern District of New York, Adv. Proc. No. 14-07900 (MG); *Rescap Liquidating Trust v. HSBC Mortgage Corp. (USA)*, In the United States Bankruptcy Court for the Southern District of New York, Adv. Case No. 14-01915 (MG)
Provided expert report.
- 2017 - *Federal Deposit Insurance Corporation as Receiver for United Western Bank v. RBS Acceptance Inc.; RBS Securities, Inc.; and RBS Holdings USA Inc.*, In the United States District Court for the District of Colorado, Civil Action No. 1:14-CV-00418-PAB-MJW.
Provided expert report.
- 2017 – *Lou Baker, et al. v. SeaWorld Entertainment, Inc., et al.*, In the United States District Court for the Southern District of California, Case No. 3:14-cv-02129-MMA-AGS
Provided expert report and deposition testimony.
- 2017 – *Old Republic Insurance Company and Old Republic Insured Credit Services, Inc., n/k/a Republic Insured Credit Services, Inc. v. The Bank of New York Mellon, BNY Mellon Trust of Delaware, Countrywide Bank, FSB, n/k/a Bank of America, N.A., Countrywide Home Loans Servicing, LP, n/k/a Bank of America, N.A.; Countrywide Bank, FSB, n/k/a Bank of America, N.A., Countrywide Home Loans, Inc., Countrywide Home Loans Servicing, LP, n/k/a Bank of America, N.A., The Bank of New York Mellon, and BNY Mellon Trust of Delaware v. Old Republic Insurance Company*; In the Circuit Court of Cook County, Illinois for the County Department, Chancery Division, Case No. 08 CH

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Provided expert report and deposition testimony.

2017 – *Royal Park Investments SA/NV v. HSBC Bank USA, National Association*, In the United STATES District Court for the Southern District of New York, Case No. 14-cv-8175-LGS-SN; *BlackRock Balanced Capital Portfolio (FI), et al. v. HSBC Bank USA, National Association*, In the United States District Court for the Southern District of New York, Case No. 14-cv-9366-LGS-SN
Provided expert report and deposition testimony.

2017 – *Aleksandr Urakhchin and Nathan Marfice, individually, as representatives of the class, and on behalf of the Allianz Asset Management of America, L.P. 401(k) Savings and Retirement Plan v. Allianz Asset Management of America, L.P., et al.*, In the United States District Court for the Central District of California, Civil Action No. 8:15-cv-01614-JVS-JCG
Provided expert report.

2017 – *U.S. Bank National Association, solely in its capacity as Trustee for Citigroup Mortgage Loan Trust 2007-AR7 v. Citigroup Global Markets Realty Corp. and CitiMortgage, Inc.*, In the United States District Court for the Southern District of New York, Civil Action No. 13 Civ. 6989 (GBD)
Provided expert report and deposition testimony.

2016 – *U.S. Bank National Association, solely in its capacity as Trustee of the Home Equity Asset Trust 2007-1 (HEAT 2007-1) v. DLJ Mortgage Capital, Inc.*, In the Supreme Court of the State of New York County of New York, Index No. 650369/2013
Provided expert report and deposition testimony.

2016 – *Federal Deposit Insurance Corporation v. Credit Suisse First Boston Mortgage Securities Corp., et al.*, In the Circuit Court of Montgomery County, Alabama, Civil Action No. 03-cv-2012-901035.00 and *Federal Deposit Insurance Corporation v. RBS Securities Inc.*, In the Circuit Court of Montgomery County, Alabama, Civil Action No. 03-cv-2012-901036.00
Provided expert report and deposition testimony.

2016 – *Home Equity Mortgage Trust Series 2006-1, et al. v. DLJ Mortgage Capital, Inc. and Select Portfolio Servicing, Inc.*, In the Supreme Court of the State of New York, County of New York, Index No. 156016; *Home Equity Mortgage Trust Series 2006-5, by U.S. Bank National Association, solely in its capacity as Trustee v. DLJ Mortgage Capital, Inc. and Select Portfolio Servicing, Inc.*, In the Supreme Court of the State of New York, County of New York, Index No. 653787
Provided expert report and deposition testimony.

2016 – *Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities Inc., et al.*, In the Superior Court of the State of California and for the City and County of San Francisco, Case No. CGC-10-497840

Provided expert report.

2016 – *Federal Deposit Insurance Corporation v. RBS Securities Inc.*, In the Circuit Court of Montgomery County, Alabama, Civil Action No. 03-cv-2012-901036.00
Provided expert report and deposition testimony.

2016 – *Federal Deposit Insurance Corporation v. Credit Suisse First Boston Mortgage Securities Corp., et al.*, In the Circuit Court of Montgomery County, Alabama, Civil Action No. 03-cv-2012-901035.00
Provided expert report.

2016 – *National Credit Union Administration Board v. RBS Securities Inc., et al.*, In the United States District Court for the Central District of California, Case No. 11-cv-5887 GW (JEM)
Provided expert report and deposition testimony.

2016 – *National Credit Union Administration Board v. RBS Securities Inc., et al.*, In the United States District Court for the District of Kansas, Case No. 11-cv-2340 JWL (JPO)
Provided expert report and deposition testimony.

2016 – *Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities Inc., et al.*, In the Superior Court of the State of California and for the City and County of San Francisco, Case No. CGC-10-497839
Provided expert report and deposition testimony.

2016 – *Federal Housing Finance Agency v. The Royal Bank of Scotland Group PLC, et al.*, In the United States District Court of Connecticut, Case No. 3:11-cv-01383 (AWT)
Provided expert report and deposition testimony.

2016 – *SACO I Trust 2006-5, issuer of the SACO I Trust 2006-5 Mortgage-Backed Certificates, Series 2006-5, et al. v. EMC Mortgage LLC, et al.*, In the Supreme Court of the State of New York County of New York, Case No. 651820/2012
Provided expert report.

2015 – *L.J. Gibson, et al. v. Credit Suisse AG, et al.*, In the United States District Court for the District of Idaho, Case No. 1:10-cv-00001-JLQ
Provided expert report.

2015 – *Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE6 v. Decision One Mortgage Company, LLC*, In the Circuit Court of Cook County, Illinois County Department – Law Division, Case No. 2013 L 005823
Provided expert report and deposition testimony.

2015 – *Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, et al.*, and *Federal Home Loan of San Francisco v. Credit Suisse Securities (USA) LLC, et al.*, In the

Superior Court of the State of California and For the City and County of San Francisco,
CGC-10-497839 and CGC-10-497840
Provided expert report.

2015 – *New Jersey Carpenters Health Fund, on Behalf of Itself and All Others Similarly Situated v. Novastar Mortgage, Inc., et al.*, In the United States District Court for the Southern District of New York, Case No. 08-cv-5310 (DAB)
Provided expert report and deposition testimony.

2015 – *In Re MF Global Holdings Limited Securities Litigation*, In the United States District Court Southern District of New York, Case No. 1:11-cv-07866-VM
Provided expert report and deposition testimony.

2015 – *Federal Home Loan Bank of Seattle, a bank created by federal law v. Deutsche Bank Securities Inc., a Delaware corporation; Deutsche Alt-A Securities, Inc., a Delaware corporation; and DB Structured Products, Inc., a Delaware corporation*, In the Superior Court of Washington for King County, Case No. 09-2-46351-4 SEA
Provided expert report and deposition testimony.

2015 – *Federal Home Loan Bank of Seattle, a bank created by federal law v. RBS Securities Inc., f/k/a/ Greenwich Capital Markets, Inc., a Delaware Corporation; Greenwich Capital Acceptance, Inc., a Delaware Corporation; and RBS Holdings USA, Inc., f/k/a Greenwich Capital Holdings, Inc., a Delaware Corporation*, In the Superior Court of Washington for King County, Case No. 09-2-46347-6
Provided expert report and deposition testimony.

2015 – *Fort Worth Employees' Retirement Fund, On Behalf of Itself and All Others Similarly Situated v. J.P. Morgan Chase & Co., et al.*, In the United States District Court for the Southern District of New York, Case No. 1:09-cv-03701 (JPO)
Provided expert report and deposition testimony.

2014 – *Federal Housing Finance Agency, as Conservator for the Federal Home Loan Mortgage Association and the Federal Home Loan Mortgage Corporation v. Merrill Lynch & Co., et al.*, In the United States District Court for the Southern District of New York, Case 1:11-cv-06202-DLC
Provided expert report.

2014 – *Federal Housing Finance Agency, as Conservator for the Federal Home Loan Mortgage Corporation v. Ally Financial Inc., et al.*, In the United States District Court for the Central District of California, Case No. 11 Civ. 7010 (DLC)
Provided expert report.

2014 – *IKB International S.A. in Liquidation and IKB Deutsche Industriebank AG v. Bank of America Corporation, et al.*, In the United States District Court for the Central District of California, Case No. 12-cv-06151-MRP
Provided expert report.

- 2014 – *Federal Home Loan Bank of Seattle, a bank created by federal law v. RBS Securities Inc., f/k/a/ Greenwich Capital Markets, Inc., a Delaware Corporation; Greenwich Capital Acceptance, Inc., a Delaware Corporation; and RBS Holdings USA, Inc., f/k/a Greenwich Capital Holdings, Inc., a Delaware Corporation*, In the Superior Court of Washington for King County, Case No. 09-2-46347-6
Provided expert report and deposition testimony.
- 2014 – *Federal Housing Finance Agency, as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation v. HSBC North America Holdings Inc., HSBC USA Inc., HSBC Markets (USA) Inc., HSBC Bank USA, N.A., HSI Asset Securitization Corporation, HSBC Securities (USA) Inc., Neal Leonard, Gerard Mattia, Todd White Norman Chaleff, and Jon Voigtman*, In the United States District Court for the Southern District of New York, Case No. 11 Civ. 6189 (DLC)
Provided expert report and deposition testimony.
- 2014 – *Massachusetts Mutual Life Insurance Company v. DB Structured Products, Inc., et al.*, In the United States District Court for the District of Massachusetts, Case No. 3:11-cv-30039-MGM
Provided expert report and deposition testimony.
- 2014 – *New Jersey Carpenters Health Fund, New Jersey Carpenters Vacation Fund, and Boilermaker Blacksmith National Pension Trust, on Behalf of Themselves and All other Similarly Situated v. Residential Capital, LLC. et al.*, In the United States District Court for the Southern District of New York, Civil Action No. 08-cv-8781 (HB)
Provided expert report and deposition testimony.
- 2014 – *Western and Southern Life Insurance Company, et al., v. DLJ Mortgage Capital, Inc. et al.*, In the Court of Common Pleas, Hamilton County, Ohio, No. A 1105352
Provided expert report and deposition testimony.
- 2013 – *In Re IndyMac Mortgage-Backed Securities Litigation*, In the United States District Court for the Southern District of New York, Civil Action No. 09-CIV-04583 (LAK)
Provided expert report and deposition testimony.
- 2013 – *MBIA Insurance Corporation v. J.P. Morgan Securities LLC (f/k/a Bear, Stearns & Co. Inc.)*, In the Supreme Court for the State of New York County of Westchester, No. 64676/2012
Provided expert report and deposition testimony.